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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

HAROLD FRIEDMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHEN EVIDENCE EXISTS THAT AN INDICTED CO-DEFENDANT AND ALLEGED CO-CONSPIRATOR, JACKIE PRESSER, THE PRESIDENT OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, HAD BEEN WORKING FOR MANY YEARS AS A "TOP ECHELON INFORMANT", KNOWN AS "ALL-PRO", FOR THE FEDERAL BUREAU OF INVESTIGATION (FBI) IN SUPPLYING CRUCIAL INFORMATION USED TO PROSECUTE THE HIGHEST LEVELS OF ORGANIZED CRIME, AND IS SUBSEQUENTLY INDICTED, WITH DEFENDANT-PETITIONER, PURSUANT TO AN INVESTIGATION SPEARHEADED BY THE DEPARTMENT OF LABOR FOR CONDUCT SPECIFICALLY AUTHORIZED AND DIRECTED BY HIGH RANKING OFFICIALS OF THE FBI, IS DEFENDANT-PETITIONER DENIED A FAIR TRIAL WITH DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL, WHERE CO-DEFENDANT PRESSER DIES PRIOR TO TRIAL AND DEFENDANT-PETITIONER'S TRIAL ATTORNEY DECIDES TO WITHHOLD THIS EXCULPATORY EVIDENCE -- THAT THE CONSPIRACY CHARGED INVOLVED CONDUCT SPECIFICALLY AUTHORIZED AND DIRECTED BY THE GOVERNMENT -- FROM CONSIDERATION BY THE JURY?

II.

WHEN PETITIONER, WHO WAS ONE OF THE VICE PRESIDENTS OF THE TEAMSTERS INTERNATIONAL UNION, SEEKS TO VACATE HIS CONVICTION THROUGH A PETITION FOR WRIT OF ERROR CORAM NOBIS ON THE GROUNDS THAT HE WAS PREJUDICIALLY DENIED A FAIR

TRIAL WITH DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL, IS THE PETITIONER ENTITLED TO AN EVIDENTIARY HEARING ON THE MERITS OF THE PETITION AS A MATTER OF FUNDAMENTAL RIGHT, WHERE THE PETITION PRESENTS FACTS OUTSIDE THE TRIAL COURT RECORD CONCERNING THE INCONSISTENT AND SELF-CONTRADICTORY CONDUCT OF PETITIONER'S TRIAL ATTORNEY IN ARBITRARILY DECIDING TO ABANDON A VIABLE AND CRUCIAL DEFENSE REGARDING THE GOVERNMENT'S SPECIFIC AUTHORIZATION AND DIRECTION FOR INDICTED CO-DEFENDANTS AND ALLEGED CO-CONSPIRATORS TO ENGAGE IN THE VERY CONDUCT FOR WHICH PETITIONER WAS INDICTED AND CONVICTED?

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I. CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN DECIDE THE IMPORTANT

FEDERAL QUESTION OF WHETHER A CONVICTED DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING ON A PETITION FOR WRIT OF ERROR CORAM NOBIS, BASED UPON THE PREJUDICIAL DENIAL TO THE RIGHT OF THE EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE, WHERE THE CONVICTED DEFENDANT PRESENTS FACTS OUTSIDE THE RECORD WHICH DOCUMENT AN INCONSISTENT AND SELF-CONTRADICTORY COURSE OF CONDUCT TO THE PREJUDICE OF THE DEFENDANT, BY HIS TRIAL ATTORNEY IN FAILING TO PRESENT HIGHLY EXCULPATORY EVIDENCE TO THE JURY; AND, THE CONVICTED DEFENDANT IS POWERLESS TO OVERCOME THE LEGAL PRESUMPTION THAT HIS TRIAL ATTORNEY ENGAGED IN "SOUND TRIAL STRATEGY" BY FAILING TO PRESENT HIGHLY EXCULPATORY EVIDENCE TO THE JURY WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING 20

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To The United States Court Of Appeals
For The Sixth Circuit

To The Honorable Chief Justice and Associated Justices of The Supreme Court Of The United States

Petitioner, **HAROLD FRIEDMAN**, respectfully prays that a writ of certiorari issue to review the September 30, 1993 judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final with the mandate issued by the Court on October 21, 1993.

OPINIONS BELOW

The September 30, 1993 decision of the United States Court of Appeals for the Sixth Circuit is unpublished and contained in the Appendix hereto, beginning at page A-1. The August 28, 1992 judgment of the United States District Court for the Northern District of Ohio, Eastern Division, is unpublished and contained in the Appendix hereto, beginning at page A-11.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed is the Sixth Circuit's decision of September 30, 1993. The case concerned the filing of a Petition for Writ of Error Coram Nobis in the United States District Court for the Northern District of Ohio, Eastern Division, in which Petitioner sought to vacate the judgment and sentence previously entered in his prior criminal conviction, pursuant to the All Writs Act, as codified in 28 U.S.C. §1651(a). The Sixth Circuit reviewed and affirmed the adverse decision entered by the District Court, pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to the effective assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

No person shall be deprived of life, liberty or property without due process of law.

UNITED STATES CODE

Contained in the Appendix hereto are the provisions of the All Writs Act, 28 U.S.C. §1651(a).

STATEMENT OF THE CASE AND THE FACTS

A. STATEMENT OF THE CASE

This case presents novel and significant issues arising out of a criminal investigation by the United States Department of Labor

and prosecution by the United States Department of Justice, Criminal Division, Organized Crime Strike Force Unit (hereinafter "Strike Force") of the former president of the International Brotherhood of Teamsters, Jackie Presser (hereinafter "Presser"), now deceased; a former vice president of the International Brotherhood of Teamsters, Petitioner, **HAROLD FRIEDMAN** (herein-after "**FRIEDMAN**"); and, a former Union representative for Local 507 of the International Brotherhood of Teamsters and Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, Anthony Hughes (hereinafter "Hughes").

FRIEDMAN, a decorated war h ro for his distinguished service in the Pacific Theatre during World War II, returned to Cleveland, Ohio, after the war where he became a major force in the Union movement. He rose to international prominence for the many benefits and working reforms he obtained for his members in Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, and Local 507 of the International Brotherhood of Teamsters.

In May, 1986, **FRIEDMAN**, Presser and Hughes were named as Defendants in an indictment returned by the federal grand jury for the Northern District of Ohio, Eastern Division, and originally styled, United States v. Presser, et al., Case No. 86-114. The indictment, in essence, alleged that Presser, Hughes and **FRIEDMAN** engaged in a criminal enterprise, and conspired to do so, as officers and employees of Local 507 of the International Brotherhood of Teamsters and Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, by embezzling funds from Local 507 and Local 19 through the payment of salaries to "ghost employees", or employees who did not perform work for the union, in violation of 18 U.S.C. §§1962(d) and (c) -- RICO (Counts I and II), and 18 U.S.C. §§2 and 501(c) -- embezzlement of union funds (Counts III and IV); and, that Presser and **FRIEDMAN** caused false 1981 reports to be filed with the Department of Labor regarding the salaries paid by Local 507 and Local 19 to "ghost employees", in violation of 18 U.S.C. §2 and 29 U.S.C. §439(b) and (d) (Counts V an VI). Presser was the only Defendant named in Count VII, false representation concerning 1981 payments to a pension plan, in violation of 18 U.S.C. §§2 and 1027.

The "pattern of racketeering activity" alleged in the RICO charge and incorporated as substantive offenses in the indictment concerned the payment of salaries to "ghost employees", in

particular, the salary paid by Local 507 to Jack Nardi, Jr., from 1972 through December 31, 1978; the salary paid by Local 507 to Allen Friedman from 1972 through September 8, 1981; the salary paid by Local 507 to George Argie from August, 1978 through June, 1979; and, the salary paid by Local 19 to Hughes, as a business agent, from 1977 through 1981, when Hughes was part owner of The Forge Restaurant.

Jury trial began on October 25, 1988, and ended on January 10, 1989. Presser died prior to trial. The verdict was returned, on January 13, 1989, finding **FRIEDMAN** guilty on Count I (18 U.S.C. §1962[d]/RICO), Count II (18 U.S.C. §1962[c]/RICO conspiracy), Count IV (18 U.S.C. §2/26 U.S.C. §501[c] -- 1981 Local 19 salary payment to Hughes), Count VI (18 U.S.C. §2/29 U.S.C. §439[b] -- 1981 false report regarding salary payment to Hughes); and, not guilty on Count III (18 U.S.C. §2/29 U.S.C. §501[c] -- 1981 Local 507 salary payment to Allen Friedman) and Count V (18 U.S.C. §2/29 U.S.C. §439[b] -- 1981 false report regarding salary payment to Allen Friedman). The jury returned a special verdict form finding **FRIEDMAN** committed three (3) of 26 acts of racketeering to support the RICO conviction: payments from Local 19 to Hughes from January 1, 1978 through December 31, 1978; payments from Local 507 to George Argie from January 1, 1979 through June 30, 1979; and, payments from Local 19 to Hughes from May 16, 1981 through December 31, 1981.

On May 26, 1989 and May 30, 1989, the Court pronounced judgment and sentence on **FRIEDMAN**, placing **FRIEDMAN** on probation for four (4) years; imposed a fine of $35,000.00; and, ordered **FRIEDMAN** to forfeit union positions as stipulated and certain funds and credits accrued by him. Sentence was stayed pending appeal.

On June 5, 1989, **FRIEDMAN** filed his Notice of Appeal to the Sixth Circuit Court of Appeals; and, **FRIEDMAN**'s conviction was affirmed by the Sixth Circuit in a non-published opinion on July 26, 1990. **FRIEDMAN**'s Writ of Certiorari to the United States Supreme Court regarding this appeal was denied on March 4, 1991.

On May 8, 1990, **FRIEDMAN** filed a Motion for New Trial, based upon newly discovered evidence which consisted of sworn testimony given by Hughes on January 4, 1990, before Frederick B. Lacey, the Independent Administrator of the International Brotherhood of Teamsters (IBT). This "newly discovered evidence" related that Hughes began meeting with Special Agent McCann in

1969 as a confidential FBI informant and conveyed information to McCann from Presser; that beginning in about 1971, Hughes and Presser both would meet directly with McCann and McCann specifically instructed and authorized Hughes and Presser to put Jack Nardi, Jr. on the payroll of Local 507 to avoid trouble with his father, an organized crime member; that Special Agent Patrick Foran directed Hughes and Presser "to hire George Argie" to "keep peace" among the organized crime families in Cleveland; and, that Hughes had been instructed by Special Agents McCann, Foran and Robert Friedrick (FBI) to frequent The Forge Restaurant, during the period of his employment at Local 19, for the purpose of gathering intelligence information from "street people" who frequented "The Forge". Defense counsel for **FRIEDMAN** argued that had this "newly discovered evidence" been known at time of trial, **FRIEDMAN** would have asserted the defense of authorization to the offenses charged which likely would have resulted in a different verdict. (See: May 9, 1990 Motion for New Trial).

The Government's Response in Opposition to **FRIEDMAN**'s Motion for New Trial argued that the "new evidence" related to a defense "known to the Defendant well before trial"; that the "new evidence" was available from other sources known to the defense before trial; and, that the "new evidence" was cumulative to other evidence concerning the "authorization" defense "which Defendant could have introduced at trial but elected not to." (See: May 24, 1990 Government Response in Opposition).[1] On January 3, 1991, the Court filed a Memorandum Opinion and Order denying **FRIEDMAN**'s Motion for New Trial, noting that the "newly discovered evidence" was "cumulative at best" to the evidence provided by the Government prior to trial in which **FRIEDMAN** "could have learned that the FBI had authorized the use of 'no show' employees." The January 3, 1991 Memorandum and Order also terminated **FRIEDMAN**'s stay of sentence; and, the RICO forfeiture and debarment provisions were ordered into effect. (See: January 3, 1991 Memorandum Opinion and Order). **FRIEDMAN** filed a timely Notice of Appeal; and, oral argument was scheduled on July 17, 1991, but waived by new counsel for **FRIEDMAN**. The Sixth Circuit Court of Appeals affirmed the decision of the trial court on September 24, 1991, Case No. 91-3044.

[1]All references made in the herein Petition are to the record incorporated in the Appendix filed in the Appeal to the United States Court of Appeals for the Sixth Circuit.

On April 20, 1992, **FRIEDMAN** filed a Petition for Writ of Error Coram Nobis, through new counsel, which alleged that **FRIEDMAN** was prejudicially deprived of his constitutional right to the effective assistance of counsel and due process of law, as guaranteed by the Fifth and Sixth Amendments of the United States Constitution, by virtue of his trial counsel's failure to mount a critical and viable defense of which counsel had full knowledge -- the defense of authorization. **FRIEDMAN** presented documented evidence in support of his contention that trial counsel had made inconsistent representations to him, the trial court and others regarding the viability and availability of the defense of authorization at time of trial, and requested a hearing on the matter. (See: April 20, 1992 Petition for Writ of Error Coram Nobis, with accompanying Appendix of Exhibits).

On May 5, 1992, the Government filed its Response in Opposition to **FRIEDMAN**'s Petition for Writ of Error Coram Nobis. The Government contended in response that the defense of authorization was a "fabricated sham"; that trial counsel for **FRIEDMAN** achieved substantial benefits for **FRIEDMAN**; and, that the failure to present the defense of authorization was a "tactical decision" and immune from attack as ineffective assistance of counsel. (See: May 5, 1992 Government Response in Opposition).

On May 18, 1992, **FRIEDMAN** filed his Reply to the Government's Response in Opposition. **FRIEDMAN** presented evidence in Reply contesting the representations and arguments made in the Government's Response. More specifically, that the Government's argument characterizing the defense of authorization as a "fabricated sham" was entirely without merit, where the following high ranking federal law enforcement officers specifically acknowledged, prior to trial, the authorization given by the federal Government to Co-Defendants and alleged Co-Conspirators, Presser and Hughes, to engage in the very conduct charged in the indictment:

-- Director Webster of the FBI "concerning the Argie authorization".

-- FBI Assistant Director, Oliver Revell, regarding "authorization for Presser to participate in unlawful acts."

-- FBI Assistant Director, James Moody, "concerning Argie authorization".

-- FBI Special Agent, Anthony Riggio, "concerning Nardi no-show employment".

-- FBI Special Agent, Thomas Kimmel, "concerning Argie authorization".

-- FBI Special Agent, Robert Langford, "concerning Argie authorization".

-- FBI Special Agents in charge of Cleveland's Organized Crime Division, Martin P. McCann, Jr., Patrick J. Foran and Robert S. Friedrick, "concerning all of the authorizations".

(May 18, 1992 Reply Brief of **FRIEDMAN**).

On August 28, 1992, the Petition for Writ of Error Coram Nobis filed by **FRIEDMAN**, along with the Petition filed by Hughes, were denied without an evidentiary hearing in a Memorandum and Order filed by the trial court. (See: August 28, 1992 Memorandum and Order, Appendix pg. 1).

On September 30, 1993, the United States Court of Appeals for the Sixth Circuit entered its unpublished opinion, affirming the District Court's decision to summarily deny, without an evidentiary hearing, the Petition for Writ of Error Coram Nobis, filed by **FRIEDMAN**, which became final judgment by the mandate filed by the Court on October 21, 1993. (September 30, 1992 unpublished decision, Sixth Cir., Appendix, pg. 1).

B. STATEMENT OF THE FACTS.

Unknown to **FRIEDMAN**, Jackie Presser and Anthony Hughes, **FRIEDMAN**'s Co-Defendants and alleged Co-Conspirators in the offenses charged in United States v. Presser, et al., Case No. 86-114, had been "top echelon informants" for the Federal Bureau of Investigation (FBI) since as early as 1969; and, supervisory agents of the FBI specifically directed and authorized **FRIEDMAN**'s Co-Defendants and alleged Co-Conspirators, Presser and Hughes, to

engage in the very conduct charged in the indictment. This evidence, while known to **FRIEDMAN**'s trial counsel, was not presented to the jury. **FRIEDMAN**'s trial counsel had made inconsistent statements to **FRIEDMAN**, the jury, the trial court and others regarding the availability and viability of the authorization defense throughout his representation of **FRIEDMAN**. These inconsistent statements made by **FRIEDMAN**'s trial counsel regarding the availability and viability of the authorization defense surfaced after **FRIEDMAN**'s conviction in Case No. 86-ll4; and, **FRIEDMAN** related the facts and circumstances concerning his trial counsel's inexcusable failure to mount this viable and critical defense and the prejudice incurred by **FRIEDMAN** in his Petition for Writ of Error Coram Nobis with accompanying Appendix.[2]

I. Existence At Time Of Trial In CR 86-114 Of acts Not Before The Court And Not In The Record Which Would Have Resulted In Entry of a Different Judgment.

FRIEDMAN was represented at trial by Paul J. Cambria, Jr., Esquire, an attorney from Buffalo, New York, but did not have a free flowing line of communication with Mr. Cambria. Prior to trial, **FRIEDMAN** expressed his concern regarding the lack of communication with Mr. Cambria and his desire to hire a second criminal defense attorney for the purpose of assisting Mr. Cambria and keeping **FRIEDMAN** apprised of developments in the case, but Mr. Cambria informed **FRIEDMAN** he would terminate his representation of **FRIEDMAN** if a second criminal defense attorney was retained. Mr. Cambria eventually agreed to allow a civil attorney and long-time friend of **FRIEDMAN**, Gerald B. Chattman, Esquire, to appear as an attorney of record in the case because of **FRIEDMAN**'s concern over the lack of communication with Mr. Cambria. However, Mr. Cambria demanded and maintained complete and total control over the defense of **FRIEDMAN**; and, **FRIEDMAN** relied entirely upon Mr. Cambria for the preparation and presentation of his defense. (See: Affidavit of **FRIEDMAN** attached

[2]The documentary evidence incorporated as Exhibits in the Appendix filed by Appellant in conjunction with his Petition for Writ of Error Coram Nobis are referred to herein by Exhibit designation as set forth in Appellant's "Coram Nobis Appendix", as filed with the Sixth Circuit Court of Appeals. [See: Beasley v. United States, 491 F.2d 687, 26 A.L.R. Fed. 204 (6TH Cir. 1974)].

to Coram Nobis Appendix as Exhibit D).

FRIEDMAN learned, during the week of July 10, 1991, that his attorney, Mr. Cambria, misrepresented facts to him concerning documents in Mr. Cambria's possession that clearly established a defense of authorization to the offenses for which **FRIEDMAN** was charged and convicted; concealed from **FRIEDMAN** the value of the defense of authorization to the offenses for which **FRIEDMAN** was charged and convicted; and, abandoned the defense of authorization contrary to the best interests of his client -- **FRIEDMAN**. (See: Affidavit of **FRIEDMAN** [Exhibit D]; Affidavit of Barbara Friedman and Affidavit of Anthony Hughes, attached to Coram Nobis Appendix as Exhibits E and F).

When new counsel for **FRIEDMAN** confronted Mr. Cambria concerning his waiver of the authorization defense at time of trial, on behalf of **FRIEDMAN**, Mr. Cambria became very defensive and stated that the decision not to use the authorization defense was a collective decision "between and among Rocco Russo, Elmer Giuliani, myself [Cambria], Jerry Chattman and other lawyers"; that the decision not to use the authorization defense was "explained in detail to the clients and the clients approved this decision"; and, that "the ultimate decision" not to use the authorization defense was because "the FBI affidavits did not support authorization for Nardi as of 1971 when he was employed." (See: July 12, 1991 correspondence from Paul J. Cambria, Jr., Esq., to Leonard W. Yelsky, Esq., attached to Coram Nobis Appendix as Exhibit G).

FRIEDMAN contested the representations made by Mr. Cambria that the decision to waive the defense of authorization on behalf of **FRIEDMAN**, was a "collective decision" "between and among" Rocco Russo, Elmer Giuliani, Jerry Chattman, Mr. Cambria and "other lawyers." Mr. Cambria demanded and maintained complete control of **FRIEDMAN**'s defense and became agitated if questioned about the defense. (See: Affidavits of **FRIEDMAN** [Coram Nobis Appendix Exhibit D] and Barbara Friedman [Coram Nobis Appendix Exhibit E]). More importantly, **FRIEDMAN** did not hire Rocco Russo, Elmer Giuliani, Jerry Chattman or "other lawyers" to represent his best interest and make decisions on his behalf in his criminal defense; and, the underlying documentation existing at time of trial relevant to the defense of authorization was never reviewed or explained by Mr. Cambria to **FRIEDMAN**, and **FRIEDMAN** never knowledgeably "approved" waiving this defense as related by Mr. Cambria in his July 12, 1991 correspondence to Mr.

Yelsky. (See: Affidavit of **FRIEDMAN** [Coram Nobis Appendix Exhibit D], and Affidavit of Barbara Friedman [Coram Nobis Appendix Exhibit E]).

Contrary to the representations made by Mr. Cambria in his July 12, 1991 correspondence regarding the lack of evidence to support the defense of authorization for all of the alleged "ghost employees" at time of trial, documentary evidence was made available to Mr. Cambria by the Government, prior to trial, which did in fact support the defense of authorization for all of the alleged "ghost employees", including FBI authorization to hire and retain George Argie, and FBI authorization for the absence of Hughes, while employed by Local 19, to appear at The Forge Restaurant in the capacity of an undercover informant for the FBI -- the predicate offenses for which **FRIEDMAN** was convicted. This evidence was never reviewed with **FRIEDMAN** nor explained by Mr. Cambria during the course of trial. (See: Court's January 3, 1991 Memorandum Opinion and Order [Coram Nobis Appendix Exhibit C]; Government's Response in Opposition to Defendant's Motion for New Trial [Coram Nobis Appendix Exhibit B]; **FRIEDMAN**'s Affidavit [Coram Nobis Appendix Exhibit D]. See also: evidence made available to Mr. Cambria prior to trial supporting defense of authorization, FBI affidavits and sworn statements of Special Agent McCann [Coram Nobis Appendix Exhibit H]; Special Agent Foran [Coram Nobis Appendix Exhibit I]; Special Agent Friedrick [Coram Nobis Appendix Exhibits J and J-1]; and, Special Agent Thomas Kimmel [Coram Nobis Appendix Exhibits K and K-1]).

Had **FRIEDMAN** been effectively represented at time of trial, and properly advised as to the defense of authorization, the jury would have been informed that **FRIEDMAN**'s Co-Defendants, and alleged Co-Conspirators, Presser and Hughes, had been directed and authorized by the Federal Bureau of Investigation -- the chief law enforcement agency of the federal government -- to commit the very offenses for which **FRIEDMAN**, Presser and Hughes were charged.

Mr. Cambria's failure to mount the critical and viable defense of authorization on behalf of **FRIEDMAN**, and the misrepresentation of facts to **FRIEDMAN** concerning the availability and viability of the defense, prevented **FRIEDMAN** from presenting to the jury the entire factual scenario concerning the hiring and retaining of the "ghost employees" alleged in the indictment; more specifically, and unbeknownst to **FRIEDMAN**, Mr. Cambria had

documentary evidence which established the following:

a. Unknown to **FRIEDMAN**, Co-Defendants, Presser and Hughes, were valuable confidential undercover informants for the FBI and actively assisted the FBI, at great risk to their personal safety, in an effort to eliminate the influence of organized crime from union activity (see McCann Affidavit, Coram Nobis Appendix Exhibit H, pg. 4).

b. The information provided by **FRIEDMAN**'s Co-Defendants, and alleged Co-Conspirators, Presser and Hughes, was so vital to the FBI that special procedures were developed to insure complete and total confidentiality concerning their unique law enforcement relationship with the FBI which were approved by top FBI officials in Washington, D.C., including the Director of the Federal Bureau of Investigation. (See: Foran affidavit, Coram Nobis Appendix Exhibit I, pg. 2; Friedrick sworn statement, Coram Nobis Appendix Exhibit J-I, pg. 5).

c. Hughes began operating as confidential "top echelon informant" for the FBI in the late 1960s and was subsequently instrumental in developing Presser as an informant. Presser and Hughes had been specifically directed by Special Agent McCann, the special agent in charge of the organized crime squad for the Cleveland office, to get as close as possible to John Nardi, an alleged organized crime boss and union leader; and, Co-Defendants, Presser and Hughes, were specifically instructed and authorized by the FBI to hire Nardi's son, John Nardi, Jr., at Local 507. When Co-Defendants, Presser and Hughes, complained to the FBI that John Nardi, Jr. was not performing work for the union and

wished to fire him, the FBI specifically instructed and authorized Co-Defendants, Presser and Hughes, to keep him on the payroll for their own personal safety, as it was believed by the FBI that any action taken by Presser and Hughes against John Nardi, Jr. would be met with gangland violence. (See: McCann Affidavit, Coram Nobis Appendix Exhibit H, pgs. I-2; Foran Affidavit, Coram Nobis Appendix Exhibit I, pgs. 2-3; Friedrick Affidavit, Coram Nobis Appendix Exhibit J, pgs. 2-3; Friedrick sworn statement, Coram Nobis Appendix Exhibit J-I, pgs. 8-9; Kimmel Affidavit and sworn statement, Coram Nobis Appendix Exhibits K and K-I).

d. The FBI authorized Co-Defendants, Presser and Hughes, to keep Allen Friedman on the payroll at Local 507 as he had organized crime contacts and was a good source of information. After Co-Defendants, Presser and Hughes, informed the FBI that Friedman was not doing anything any longer for the union due to health problems, and just causing problems, the FBI specifically instructed **FRIEDMAN**'s Co-Defendants, and alleged Co-Conspirators, Presser and Hughes, to keep Friedman on the union payroll, for fear they would be killed by an organized crime faction associated with Allen Friedman if he was terminated. (See: McCann Affidavit, Coram Nobis Appendix Exhibit H, at pg. 2; Foran Affidavit, Coram Nobis Appendix Exhibit I, at pgs. 5-6; Friedrick Affidavit, Coram Nobis Appendix Exhibit J, pgs. 3-4).

e. The FBI specifically authorized **FRIEDMAN**'s Co-Defendants, and alleged Co-Conspirators, Presser and Hughes, to put George Argie on the union payroll because he was a conduit of

valuable information from high levels of organized crime, particularly James Licavoli, the "boss" of the Cleveland organized crime family. The information provided by Presser and Hughes, through Argie, was of crucial importance to the FBI. (See: Foran Affidavit, Coram Nobis Appendix Exhibit I, pg. 3).

f. The FBI specifically instructed **FRIEDMAN**'s Co-Defendant, Hughes, to spend time at The Forge Restaurant while employed by the union because the "wise guys hang out there" and it was a good place to get information on organized crime activity. (See:McCann Affidavit, pg. 2).

g. There was a legitimate concern by the FBI that if Co-Defendant, and alleged Co-Conspirator, Presser, refused to put "ghost employees", John Nardi, Jr., George Argie and Allen Friedman, on the union payrolls, Presser "would likely have been killed by the warring criminal element in Cleveland"; and, as a result, "the FBI acquiesced in this fait accompli in that, by doing so, Presser would be protected from hoodlum killings." (See: Kimmel Affidavit and sworn statement, Coram Nobis Appendix Exhibits K and K-I).

Had **FRIEDMAN** been effectively represented at time of trial and not misinformed by his counsel, Mr. Cambria, concerning the availability and viability of the defense of authorization, **FRIEDMAN** would have forcefully asserted the defense of authorization in companion with his defense that the alleged "no-show" employees did, to the best of his knowledge, perform work; and, a different result would have been entered in the judgment returned in this case. (See: Affidavits of former appellate judge, Jack G. Day, Esq.; the former president of the National Association of Trial Lawyers, James R. Willis, Esq.; and, a former Special Agent for the Federal Bureau of Investigation and judge, Harold Wonnell, Esq., attached to Appendix as Coram Nobis Appendix Exhibits L, M, and N).

Indeed, as the trial court found, over the Government's objection, in a discussion in-chambers with counsel and outside the presence of **FRIEDMAN**, **FRIEDMAN** had a right to assert the defense of authorization even though **FRIEDMAN** testified that the alleged "ghost employees", to the best of his knowledge, did perform work. (See: Portion of in-chambers discussion regarding this issue, Coram Nobis Appendix, Exhibit O).

2. Lack Of Knowledge Constituting Grounds By Petitioner And By Court At Time Of Trial

FRIEDMAN relied entirely on Mr. Cambria's skills as a criminal defense attorney for the preparation and presentation of his defense. Prior to trial, Mr. Cambria jointly filed a Motion to Dismiss with prior counsel for **FRIEDMAN**'s Co-Defendants and alleged Co-Conspirators, Anthony Hughes and Jackie Presser, which asserted, in part, the affirmative defense of authorization on behalf of **FRIEDMAN**. (See: April 30, 1987 Motion to Dismiss, Coram Nobis Appendix, Exhibit P).

Prior to trial, the trial court granted Mr. Cambria's Motion to admit the FBI affidavits of Special Agents McCann and Foran as relevant to the defense of authorization. (See: Trial court's October 19, 1988 pretrial Order, Coram Nobis Appendix, Exhibit Q).

In opening statement to the jury, Mr. Cambria explained to the jury, in detail, the defense of authorization and its application to **FRIEDMAN**. More specifically, Mr. Cambria informed the jury that two (2) FBI agents [Special Agents McCann and Foran] submitted sworn statements concerning the "activities of Presser" as a confidential FBI informant and the hiring of the alleged "ghost employees"; that Special Agent McCann acknowledged in his sworn statement that he specifically discussed the hiring of John Nardi, Jr. with Presser and told Presser to hire and retain Nardi, but not to let him [Nardi] work at 507 at the Union hall; that Special Agent Foran, a high ranking FBI agent, acknowledged in his sworn statement that he told Presser to hire and retain George Argie and Allen Friedman; and, that his client, Harold Friedman [**FRIEDMAN**], knew nothing about Presser's status as a confidential FBI informant, or of Presser's secret arrangement with the Government to hire and retain the alleged "ghost employees" named in the indictment. Mr. Cambria also informed the jury that to the best of **FRIEDMAN**'s knowledge, the alleged "ghost employees" did perform work. (See:

Portions of opening statement made by Mr. Cambria, Coram Nobis Appendix, Exhibit R).

During the course of trial, Mr. Cambria, inexplicably, decided not to present the authorization defense on behalf of **FRIEDMAN**, and told **FRIEDMAN** that the FBI affidavits were "worthless", and did not help **FRIEDMAN**, as the FBI affidavits did not apply to all of the alleged "ghost employees"; that **FRIEDMAN**'s testimony and other evidence provided more than enough evidence for the jury to acquit him of any wrongdoing in this matter; and, that the presentation of the FBI affidavits would be a "needless waste of time" as they did not present a "viable defense" for **FRIEDMAN**. Mr. Cambria did not review with **FRIEDMAN** the FBI affidavits and statements in his possession. (See: Affidavit of **FRIEDMAN**, Coram Nobis Appendix, Exhibit D).

Contrary to the representations made by Mr. Cambria to **FRIEDMAN** at time of trial, and unknown to **FRIEDMAN**, the trial court found in an in-chambers discussion with counsel, that the FBI affidavits and the defense of authorization did apply to **FRIEDMAN**; and, that **FRIEDMAN** had a right to present the defense of authorization. (See: Trial court's in-chambers finding regarding **FRIEDMAN**'s right to present the defense of authorization, Coram Nobis Appendix, Exhibit O).

FRIEDMAN did not have any relationship with the FBI and never worked for the FBI as a confidential informant. Prior to the return of his indictment, **FRIEDMAN** did not know that Presser and Hughes worked for the FBI as confidential informants. The trial court would have had no way of knowing, at time of trial, the misrepresentations made by Mr. Cambria to **FRIEDMAN** concerning the defense of authorization.

3. Discovery Of Grounds For Petition For Writ Of Error Coram Nobis By FRIEDMAN And Explanation Of Delay In Discovery.

Following **FRIEDMAN**'s conviction, a hearing was conducted before Frederick B. Lacey, the Independent Administrator of the International Brotherhood of Teamsters (IBT), concerning charges made against **FRIEDMAN** and Anthony Hughes arising from their conviction in this case. In defense to these charges, Mr. Cambria now took the position that the authorization defense was crucial to establishing **FRIEDMAN**'s innocence, but could not be

presented at time of trial because Mr. Hughes would not testify. (See: Representations made by Mr. Cambria to Administrator Lacey, Coram Nobis Appendix, Exhibit S).

At the administrative hearing conducted on January 4, 1990, Mr. Hughes testified in detail regarding his secret law enforcement relationship with the FBI, as a confidential informant, since 1969; and, that he originally conveyed information to the FBI from Presser, until 1971, when Presser himself began meeting directly with the FBI in the capacity of a confidential informant. Mr. Hughes further testified that the FBI, as reflected in the affidavits of Special Agents McCann and Foran, had knowledge of, acquiesced to, and specifically directed and authorized Presser and Hughes to engage in the very conduct charged in the indictment concerning the alleged "ghost employees". (See: January 4, 1990 testimony of Anthony Hughes, attached to **FRIEDMAN**'s May 8, 1990 Motion for New Trial Based on Newly Discovered Evidence, Coram Nobis Appendix, Exhibit A).

Mr. Cambria's cross-examination of Mr. Hughes at the January 4, 1990 administrative hearing focused on whether Presser told **FRIEDMAN**, prior to the hiring of George Argie at Local 507, that the FBI had directed Presser to hire Argie. Hughes testified that he believed Presser did relate this information to **FRIEDMAN**, but **FRIEDMAN** had little, if any, response, as Presser was the "boss" and told **FRIEDMAN** that Argie would be working for him [Presser] and not **FRIEDMAN**. (See: January 4, 1990 administrative hearing testimony of Anthony Hughes, at pgs. 46-47, attached to Coram Nobis Appendix, May 8, 1990 Motion for New Trial [Exhibit A]).

FRIEDMAN had no recollection of a meeting with Presser, prior to the hiring of George Argie, in which Presser told **FRIEDMAN** the FBI directed Presser to hire Argie. **FRIEDMAN** was, in fact, surprised that Mr. Cambria had never reviewed this matter with **FRIEDMAN**, prior to posing the question to Hughes, as **FRIEDMAN** had repeatedly told Mr. Cambria during the course of his legal representation that Presser had kept his confidential informant status with the FBI a secret from **FRIEDMAN**. (See: Affidavit of **FRIEDMAN** [Coram Nobis Appendix Exhibit D]).

Indeed, Mr. Cambria had consistently informed the court and jury at **FRIEDMAN**'s trial that **FRIEDMAN** did not know of the confidential informant status maintained by Presser and Hughes with the FBI. (See: Coram Nobis Appendix, Opening Statement of Mr. Cambria [Exhibit R] ; and, trial court's in-chambers discussion

with counsel regarding the defense of authorization [Exhibit O]).

Mr. Cambria then related to Administrator Lacey that he [Cambria] had first learned, during a conversation with Mr. Hughes on the evening of January 3, 1990, that Presser informed **FRIEDMAN** the FBI contacted Presser to hire Argie. (See: Representations made by Mr. Cambria at January 4, 1990 administrative hearing, Coram Nobis Appendix, Exhibit T). When Investigations Officer, Charles M. Carberry, Esq., questioned **FRIEDMAN**, at the January 4, 1990 administrative hearing regarding the purported meeting with Presser in which Presser told **FRIEDMAN** the FBI wanted Argie hired, **FRIEDMAN** could not deny the incident occurred, but testified that he would not lie and did not recall such a meeting. (See: Testimony of **FRIEDMAN** at January 4, 1990 administrative hearing, Coram Nobis Appendix, Exhibit U).

Mr. Cambria then represented to Administrator Lacey at the January 4, 1990 administrative hearing, that prior to Presser's death, Presser told him [Cambria] about the meeting with **FRIEDMAN** in which Presser told **FRIEDMAN** the FBI had specifically directed Presser to hire George Argie. When Administrator Lacey inquired if Mr. Cambria brought this information to the attention of the jury, at the time of **FRIEDMAN**'s trial, through the testimony of **FRIEDMAN**, Mr. Cambria became very defensive and stated he could not raise the defense of authorization at time of trial, because Hughes and the FBI agents would not testify; and, that **FRIEDMAN**'s recollection of the meeting with Presser was unclear, but the matter was never reviewed during **FRIEDMAN**'s testimony because the defense of authorization could not be established. (See: Representations made by Mr. Cambria at January 4, 1990 administrative hearing, Coram Nobis Appendix, Exhibit V).

Mr. Cambria never told **FRIEDMAN** that he [Cambria] had a discussion with Presser, prior to Presser's death, in which Presser informed Cambria the FBI told Presser to hire Argie and Presser related this information to **FRIEDMAN**; and, Mr. Cambria never reviewed this matter with **FRIEDMAN** during the course of trial. (See: Affidavit of **FRIEDMAN** Coram Nobis Appendix, Exhibit D).

After the January 4, 1990 administrative hearing, **FRIEDMAN** became very concerned about the inconsistent and different representations made by Mr. Cambria to **FRIEDMAN** and others concerning the defense of authorization. (See: Affidavit of **FRIEDMAN** Coram Nobis Appendix, Exhibit D).

Indeed, Mr. Cambria had represented prior to **FRIEDMAN**'s trial that the defense of authorization was material to the issue of **FRIEDMAN**'s innocence (see April 30, 1987 Motion to Dismiss Indictment Coram Nobis Appendix, Exhibit P); and successfully fought to obtain an Order from the trial court regarding the admissibility of the FBI affidavits of Special Agents McCann and Foran. (See: Trial court's October 19, 1988 Order, Coram Nobis Appendix, Exhibit Q). Mr. Cambria also informed the jury in opening statement about the FBI affidavits of Special Agents McCann and Foran, and the defense of authorization for the offenses charged; and, that Presser and Hughes kept their confidential informant status with the FBI a secret from **FRIEDMAN**. (See: Opening Statement of Mr. Cambria Coram Nobis Appendix, Exhibit R). When it came to presenting the defense, however, Mr. Cambria told **FRIEDMAN** that the FBI affidavits were "worthless" and a "waste of time", and refused to present them to the jury, as **FRIEDMAN**'s testimony and other evidence provided more than enough evidence for the jury to acquit **FRIEDMAN**. (See: **FRIEDMAN**'s Affidavit [Exhibit D]; Affidavit of Barbara Walden Friedman [Exhibit E]; and, Affidavit of Anthony Hughes [Exhibit F], attached to Coram Nobis Appendix). Mr. Cambria then related at the administrative hearing, on January 4, 1990, that the defense of authorization was crucial to establishing **FRIEDMAN**'s innocence (Coram Nobis Appendix, Exhibit S). Mr. Cambria also related to Administrator Lacey that he first learned Presser reportedly told **FRIEDMAN** the FBI directed Presser to hire Argie, during a conversation with Hughes, on the evening of January 3, 1990 (Coram Nobis Appendix, Exhibit T), but later changed his story and told Administrator Lacey that Presser told him
[Cambria] this, before Presser died (Coram Nobis Appendix, Exhibit V).

Mr. Cambria told **FRIEDMAN** not to be concerned; that the truth would surface regarding **FRIEDMAN**'s innocence in **FRIEDMAN**'s Motion for New Trial Based Upon Newly Discovered Evidence. (See: Affidavit of **FRIEDMAN**, Coram Nobis Appendix, Exhibit D).

Following the filing of **FRIEDMAN**'s May 8, 1990 Motion for New Trial, **FRIEDMAN** spoke with Co-Defendant Hughes regarding the motion and learned that Mr. Cambria knew and had documents in his possession, at time of trial, which established the defense of authorization for the "ghost employees" alleged in the indictment;

and, that Hughes' decision not to assert the defense of authorization, at time of trial, was based on his fear of reprisals by organized crime figures against him and his family, and his belief that the evidence showed he clearly performed work, but his decision should not have affected **FRIEDMAN**'s ability to assert the defense, and it was assumed by Hughes, **FRIEDMAN** would assert the defense. (See: Coram Nobis Appendix, Hughes Affidavit, [Exhibit F]; and, **FRIEDMAN**'s Affidavit, [Exhibit D]).

Following the Court's January 3, 1991 decision denying **FRIEDMAN**'s Motion for New Trial, and during the appeal filed to the Sixth Circuit concerning **FRIEDMAN**'s Motion for New Trial, **FRIEDMAN** again began questioning the veracity of Mr. Cambria regarding the inconsistent representations made by Mr. Cambria to **FRIEDMAN** at time of trial, at time of the administrative hearing and in **FRIEDMAN**'s Motion for New Trial Based on Newly Discovered Evidence concerning the availability and viability of the defense of authorization. Mr. Cambria became upset over the fact that anyone would question his legal ability in defending **FRIEDMAN**, and sent a long letter to **FRIEDMAN** comparing himself to Clarence Darrow, in which he falsely related that all facets of the authorization defense had been reviewed in minute detail with **FRIEDMAN** at trial, when in fact, Mr. Cambria never reviewed the FBI affidavits with **FRIEDMAN**, and referred to them as being "worthless". (See: **FRIEDMAN**'s affidavit, Exhibit D; and, April 24, 1991 letter from Mr. Cambria to **FRIEDMAN**, Coram Nobis Appendix, Exhibit W).

FRIEDMAN became very concerned and upset over the representations made by Mr. Cambria in his letter of April 24, 1991, and began looking for new counsel and eventually contacted Leonard W. Yelsky, Esq., to represent him as new counsel in this matter. (See: **FRIEDMAN**'s affidavit, Coram Nobis Appendix, Exhibit D). **FRIEDMAN**'s new counsel reviewed documentation provided to him by Mr. Chattman and Hughes concerning the defense of authorization and new counsel pointed out to **FRIEDMAN** the documents possessed by Mr. Cambria, prior to and during trial, which clearly set forth the defense of authorization for all of the "ghost employees" alleged in the indictment. (See: **FRIEDMAN**'s Affidavit, Coram Nobis Appendix, Exhibit D).

Following this revelation to **FRIEDMAN**, on or about July 10, 1991, **FRIEDMAN** notified Mr. Cambria that he was being terminated and replaced by new counsel. (See: **FRIEDMAN**'s Affidavit, Coram Nobis Appendix, Exhibit D).

FRIEDMAN then learned that Mr. Cambria had falsely informed new counsel that the decision not to mount the defense of authorization on behalf of **FRIEDMAN** had been a "collective decision" approved by **FRIEDMAN**, after **FRIEDMAN** was fully apprised of the defense, "because the FBI affidavits did not support authorization of Nardi." (See: July 12, 1991 Cambria letter, Coram Nobis Appendix, Exhibit G).

As pointed out by the trial court in its January 3, 1991 Memorandum and Order denying **FRIEDMAN**'s Motion for New Trial, the Government's responsive pleadings and Mr. Cambria's opening statement to the jury, Mr. Cambria clearly had possession of documents prior to trial to enable him to mount the defense of authorization on behalf of **FRIEDMAN**. (See: Coram Nobis Appendix, January 3, 1991 Memorandum and Order [Exhibit C]; and, Government's Response in Opposition to **FRIEDMAN**'s Motion for New Trial [Exhibit B]; and, Mr. Cambria's opening statement [Exhibit R]).

4. The Denial Of FRIEDMAN's Petition for Writ Of Error Coram Nobis.

The trial court summarily denied **FRIEDMAN**'s Petition for Writ of Error Coram Nobis, without an evidentiary hearing, on the grounds that the decision of **FRIEDMAN**'s trial counsel not to pursue the authorization defense was a "strategic or tactical trial decision made after careful deliberation"; and, that the failure of **FRIEDMAN**'s trial counsel to mount the authorization defense did not deprive **FRIEDMAN** of due process or the effective assistance of counsel, as trial counsel had obtained "substantial benefits for **FRIEDMAN**. (See: August 28, 1992 Memorandum Opinion).

REASONS FOR GRANTING WRIT

I.

CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER A CONVICTED DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING ON A PETITION FOR WRIT OF ERROR CORAM NOBIS, BASED

UPON THE PREJUDICIAL DENIAL TO THE RIGHT OF THE EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE, WHERE THE CONVICTED DEFENDANT PRESENTS FACTS OUTSIDE THE RECORD WHICH DOCUMENT AN INCONSISTENT AND SELF-CONTRADICTORY COURSE OF CONDUCT TO THE PREJUDICE OF THE DEFENDANT, BY HIS TRIAL ATTORNEY IN FAILING TO PRESENT HIGHLY EXCULPATORY EVIDENCE TO THE JURY; AND, THE CONVICTED DEFENDANT IS POWERLESS TO OVERCOME THE LEGAL PRESUMPTION THAT HIS TRIAL ATTORNEY ENGAGED IN "SOUND TRIAL STRATEGY" BY FAILING TO PRESENT HIGHLY EXCULPATORY EVIDENCE TO THE JURY WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING.

In construing the All Writs Act, under 28 U.S.C. §l65l(a)[3], the Supreme Court held that continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through a remedy of the nature of coram nobis under circumstances compelling such action in order to achieve justice. See: United States v. Morgan, 346 U.S. 502, 504-06, 76 S.Ct. 247, 98 L.Ed. 248 (l954). Accordingly, a federal trial court must hear a motion in the nature of a writ of coram nobis filed, for the purpose of voiding a judgment of conviction rendered by the same court, where it is alleged that the defendant was deprived of his right to effective assistance of counsel at his trial, in failing to present a viable and crucial defense; and this issue can not be resolved from the record. See: United States v. Morgan, supra, at 509-ll.

In seeking post-conviction relief to vacate a conviction prejudicially produced in violation of a defendant's fundamental constitutional rights, a Petition for Writ of Error Coram Nobis is the

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[3] *28 U.S.C. §1651(a) provides:*

> *"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."*

procedural equivalent of a Petition for Writ of Habeas Corpus, under 28 U.S.C. §2255, with the sole difference being that the defendant is not a prisoner in custody but continues to suffer "lingering collateral consequences" of an unconstitutional conviction. Yasui v. United States, 772 F.2d 1496, 1498 (9th Cir. 1985).

Accordingly, as in the case of a Petition for Writ of Habeas Corpus, a district court, when presented with a Petition for Writ of Error Coram Nobis seeking to vacate a conviction on the grounds of ineffective assistance of counsel, should in the interest of justice conduct an evidentiary hearing, "unless the motions and files and records of the case conclusively show" that the petitioner is entitled to no relief. See: 28 U.S.C. §2255. An evidentiary hearing has been held to be required, where a post-conviction petition presents a claim for relief based on matters outside the record or events outside the courtroom. United States v. Burrows, 872 F.2d 915, 917 (9th Cir. 1989); Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988).

In the case at bar, **FRIEDMAN**, in his Petition for Writ of Error Coram Nobis, documented facts outside the trial record which related inconsistent and self-contradictory statements and conduct by **FRIEDMAN**'s trial attorney concerning the trial attorney's arbitrary and capricious decision to abandon a viable and crucial defense regarding the Government's specific direction and authorization, without **FRIEDMAN**'s knowledge, to **FRIEDMAN**'s indicted Co-Defendants and alleged Co-Conspirators, who themselves were important undercover operatives and top echelon informants for the Federal Bureau of Investigation (FBI) to engage in the very conduct for which **FRIEDMAN** was indicted and convicted. (See: **FRIEDMAN**'s Petition for Writ of Error Coram Nobis with attached Exhibits).

The factual representations set forth by **FRIEDMAN** in his Petition were unrebutted by affidavit or exhibit in the responsive pleadings filed by the Government. Instead, the Government argued that **FRIEDMAN**'s trial attorney had obtained "substantial benefits for him"; and, that the decision to abandon the defense of authorization was a "tactical trial strategy decision" and therefore insulated from attack by way of a post-conviction motion for ineffective assistance of counsel. This argument was adopted by the District Court and the Sixth Circuit Court of Appeals in summarily denying **FRIEDMAN**'s Petition for Writ of Error Coram Nobis without an evidentiary hearing, in reliance upon this Court's decisions in

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), reh. den., 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864.

It is true that judicial scrutiny of counsel's performance must be highly differential and a legal presumption exists that challenged action undertaken by a trial attorney must be considered sound trial strategy. Strickland v. Washington, supra; Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 1264, 91 L.Ed.2d 1444 (1986); Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Trial counsel's tactics, however, are not wholly immune from Sixth Amendment review, but the tactical decisions made must be particularly egregious before they provide a basis for post-conviction relief. Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Boyde v. California, 492 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

The case at bar is similar to the facts in United States v. Burrows, supra. In Burrows, the defendant was convicted of racketeering conspiracy (18 U.S.C. §1962[d]). His conviction was affirmed on appeal. Burrows then filed a Motion for Post-Conviction Relief under 28 U.S.C. §2255, on the grounds that he received ineffective assistance of counsel where his trial attorney failed to investigate his mental state and present evidence regarding his mental state at trial regarding a viable insanity defense. Burrows attached to his post-conviction motion affidavits and medical records to show that his attorney knew of his paranoid schizophrenic condition and failed to present evidence of his mental state to the jury in an insanity defense. The District Court in Burrows assumed the trial attorney considered the insanity defense and rejected it for strategic reasons, although these facts were not established in the trial record.

The District Court in Burrows summarily denied the Defendant's petition without an evidentiary hearing. The Ninth Circuit, on appeal, reversed and remanded the case on the grounds that the District Court should have held an evidentiary hearing where claims raised facts which occurred out of the courtroom, and off the record, and the record did not conclusively show that Defendant's trial attorney was not ineffective in failing to present a viable defense.

In the case at bar, **FRIEDMAN**, in his Petition for Writ of Error Coram Nobis, documented facts which occurred out of the courtroom and off the record regarding his trial attorney's arbitrary decision to abandon a viable and crucial defense regarding the

Government's specific direction and authorization for indicted Co-Defendants and alleged Co-Conspirators to engage in the very conduct for which **FRIEDMAN** was indicted and convicted.

The District Court summarily denied **FRIEDMAN**'s Petition, without an evidentiary hearing, on the assumption that **FRIEDMAN**'s trial attorney had made a strategic decision to abandon the defense because the trial attorney believed the defense of authorization would conflict with the testimony presented by **FRIEDMAN** at time of trial that he believed the alleged "ghost employees" performed work for the Union. This assumption by the Court was based upon a letter by **FRIEDMAN**'s trial attorney and included as an Exhibit in the Petition, in which the attorney purportedly related his reasoning for not presenting the defense of authorization at time of trial, and further related that this reasoning had been reviewed by **FRIEDMAN** prior to making the decision not to present the defense. The Court concluded that **FRIEDMAN**'s trial attorney obtained substantial benefits for **FRIEDMAN** and the decision not to present the defense of authorization was a tactical decision entitled to a presumption of sound trial strategy under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), reh. den., 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864.

The decision entered by the District Court adopted the argument presented by the Government, and was subsequently affirmed on Appeal. The District Court, in a decision adopted by the Court of Appeals, therefore denied **FRIEDMAN**'s prayer for post-conviction relief entirely upon a self-serving letter written by **FRIEDMAN**'s trial attorney after his conviction, and after **FRIEDMAN** began questioning his trial attorney regarding the inconsistent representations made by his trial attorney to **FRIEDMAN** at time of trial, and at an administrative hearing after **FRIEDMAN**'s trial concerning the availability and viability of the defense of authorization. In this letter, **FRIEDMAN**'s trial attorney compared himself to Clarence Darrow and falsely related as facts, representations which **FRIEDMAN** knew were not true. (See: **FRIEDMAN**'s Affidavit, Coram Nobis Appendix, Exhibit D; and, April 24, 1991 letter to **FRIEDMAN** from his trial counsel, Coram Nobis Appendix Exhibit W). **FRIEDMAN** attached exhibits to his Petition for Writ of Error Coram Nobis which contradicted every allegation made by his trial attorney in his self-serving letter with evidence both inside and outside the trial record. (See: Petition for Writ of Error Coram Nobis, Coram Nobis Appendix Exhibits A through W).

Unlike the Petitioner in United States v. Burrows, supra, **FRIEDMAN** was denied the right to an evidentiary hearing at which he could demonstrate that the attorneys' deficient performance in waiving a viable defense at time of trial prejudiced the defendant; and, that there existed a reasonable possibility that but for his trial attorney's unprofessional error in judgment in failing to present the defense of authorization, the result of his trial would have been different. See: Strickland v. Washington, supra.

Indeed, it is difficult to imagine a more egregious error in judgment by a trial attorney than the failure to present evidence, promised to the jury in opening statement, that the Government specifically directed and authorized the commission of the alleged offenses for which **FRIEDMAN** and his indicted Co-Defendants and alleged Co-Conspirators were charged. Not only did **FRIEDMAN**'s trial attorney have possession of such evidence at time of trial, but after **FRIEDMAN** was wrongfully convicted, his trial attorney argued at an administrative hearing that if he had the ability to present this crucial evidence at time of trial, the result undoubtedly would have been different, thereby vindicating **FRIEDMAN**.

Moreover, the District Court's finding, adopted by the Court of Appeals, that **FRIEDMAN**'s trial attorney achieved substantial benefits for **FRIEDMAN** in obtaining a not guilty verdict on 23 of 26 alleged racketeering acts and a sentence of probation following the conviction is entirely without merit where **FRIEDMAN** was a respected Union and civic leader for over 40 years; had always maintained his innocence; testified in his defense that the alleged "ghost employees" were hired by Presser and worked under Presser, and **FRIEDMAN** assumed they performed working functions for the Union; and, **FRIEDMAN** was convicted on four (4) of six (6) counts charged in the indictment, including racketeering activity, publicly disgraced and humiliated for conduct authorized by the Government, and in which he did not participate, and stripped of his Union positions.

Under the extraordinary facts and circumstances documented in **FRIEDMAN**'s Petition for Writ of Error Coram Nobis, **FRIEDMAN** was entitled to an evidentiary hearing as afforded by other appellate courts, in order to determine whether **FRIEDMAN**'s conviction was prejudicially produced in violation of his fundamental right to a fair trial with due process of law and effective assistance of counsel, where his trial attorney decided to abandon a viable defense of Government authorization which, if accepted by the jury,

would have completely exonerated **FRIEDMAN** of any culpability in the offenses for which he was indicted and convicted.

II.

THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF THE FIRST, FOURTH, FIFTH AND NINTH CIRCUITS, AND THE POLICY OF LAW SET FORTH BY THIS HONORABLE COURT IN UNITED STATES V. MORGAN, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954) AND MACHIBRODA V. UNITED STATES, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (I962), IN SUMMARILY DENYING, WITHOUT AN EVIDENTIARY HEARING, A PETITION FOR POST-CONVICTION RELIEF, ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE THE PETITION SETS FORTH, AND RELIES UPON, FACTS OCCURRING OUTSIDE THE COURTROOM AND OUTSIDE THE TRIAL RECORD.

In United States v. Morgan, supra, the Court reviewed the denial of a Petition for Writ of Error Coram Nobis in which a post-conviction defendant sought to vacate his conviction on the grounds that his conviction was prejudicially produced without his fundamental and constitutional right to counsel.

In Morgan, this Court found that it could not be deduced from the record whether counsel had been properly waived and the post-conviction defendant was, therefore, entitled to an opportunity, through a due process hearing, to attempt to show that his conviction was invalid. "Otherwise a wrong may stand uncorrected which the available remedy would right." 346 U.S., at 512.

Similarly, in Machibroda v. United States, supra, this Court held when reviewing the summary denial, without an evidentiary hearing, of a post-conviction defendant's petition for habeas corpus relief, under 28 U.S.C. §2255, that it was error to make findings on issues of fact, without an evidentiary hearing, on the Government's contention that the claims raised by the post-conviction defendant were "incredible, improbable and unbelievable", where the allegations made by the post-conviction defendant concerned facts

outside the record and the motion and the files and records of the case do not conclusively show that the post-conviction defendant is entitled to no relief. This Court vacated and remanded the decisions of the lower courts, and found:

> "There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U.S.C. §2255 can be served in this case only by affording the hearing which its provisions require." Machibroda v. United States, supra, at 496.

As previously reviewed, the Ninth Circuit in United States v. Burrows, supra, held that a District Court is required to hold an evidentiary hearing, where a post-conviction defendant claims, on facts outside the record, that he was prejudicially denied the effective assistance of counsel in failing to present evidence of a viable defense; and, the files and record in the case do not conclusively show the post-conviction defendant is entitled to no relief. See: United States v. Burrows, supra, at 917; Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988).

Similarly, the Fifth Circuit in United States v. Strother, 434 F.2d 1292 (5th Cir. 1970), cert. den. 409 U.S. 1011, 93 S.Ct. 456, 34 L.Ed.2d 305, held that a post-conviction defendant in a coram nobis proceeding is entitled to a meaningful hearing with findings based on evidence, unless the files and records of the case conclusively show that the petitioner is entitled to no relief.

The First Circuit in United States v. Rodriquez, 929 F.2d 747 (1st Cir. 1991), also held that an evidentiary hearing is required where a post-conviction defendant seeking to vacate his conviction on the grounds of ineffective assistance of counsel raises claims outside the trial record which can not be conclusively resolved in a manner to determine that the petitioner is entitled to no relief.

The Fourth Circuit in United States v. Magini, 973 F.2d 261 (4th Cir. 1992), has also found that an evidentiary hearing is required where a post-conviction defendant makes a claim of ineffective assistance of counsel involving inconsistencies beyond

the record of material facts which are in dispute; and, the petitioner would be entitled to relief, if the facts as claimed in her petition were true.

In the case at bar, the Sixth Circuit has decided that a post-conviction defendant, in challenging his conviction on the grounds of ineffective assistance of counsel, is not entitled to an evidentiary hearing, even though the Petitioner's claims are based entirely on facts outside the courtroom and the trial record, and inconsistent with the factual findings proposed by the Government and summarily adopted by the District Court.

Accordingly, the Sixth Circuit's decision is in conflict with the law of other appellate circuit courts and the policy of law set forth by this Honorable Court; and, Petitioner respectfully submits that certiorari should be granted.

CONCLUSION

In the Court below, both the District Court and the United States Court of Appeals for the Sixth Circuit summarily denied Petitioner, **HAROLD FRIEDMAN**, a right to an evidentiary hearing on the basis of a self-serving letter written by his trial attorney, after the conviction, in an attempt to rationalize and justify his bizarre conduct in arbitrarily abandoning a crucial and viable defense of Government authorization as promised to the jury in opening statement. This is true even though the self-serving letter, relied upon by the Court, was included by Petitioner **FRIEDMAN** in his appendix to his Petition, along with the exhibits, to demonstrate the inconsistent and self-contradictory positions taken by his trial attorney in abandoning the defense of authorization at time of trial. Accordingly, the case presents novel and significant issues concerning the right of a convicted defendant to an evidentiary hearing in a coram nobis proceeding where facts concerning the ineffective assistance of counsel evolve outside the courtroom and outside the trial record.

The Opinion of the Sixth Circuit Court of Appeals in affirming the decision of the District Court regarding the denial of an evidentiary hearing in this matter is at odds with other federal appellate circuits. The case also provides a factual scenario for the Court's consideration regarding the apparent willingness of the Government to "sweep under the rug" the conduct undertaken by one (I) law enforcement agency -- FBI -- if it is at odds with the

conduct being prosecuted by another law enforcement agency -- the United States Department of Labor -- in a high profile criminal prosecution of Union leaders.

Accordingly, Petitioner **FRIEDMAN** prays this Honorable Court assert its jurisdiction and hear this case on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief for Defendant-Appellant, Harold Friedman, has been served upon The Honorable Drew S. Days, III, Solicitor General, Department of Justice, Office of the Solicitor General, Tenth and Constitution Avenues, Room 5143, Washington, D.C. 20530; and, Robert O. Lampl, Esq., Counsel for Anthony Hughes, The Convention Tower, 960 Penn Avenue, Pittsburgh, Pennsylvania 15222, by regular United States mail this _____ day of _____, 1993.

_____

LEONARD W. YELSKY, ESQ.
Counsel for Petitioner

FILED

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LEONARD GREEN, CLERK

Nos. 92-3916/3917

UNITED STATES OF AMERICA	)	
	)	**ON APPEAL FROM THE**
Plaintiff-Appellee,	)	**UNITED STATES DISTRICT**
	)	**COURT FOR THE NORTHERN**
v.	)	**DISTRICT OF OHIO**
	)	
HAROLD FRIEDMAN and	)	
ANTHONY HUGHES,	)	
	)	**(NOT RECOMMENDED FOR**
Defendents-Appellants.	)	**FULL-TEXT PUBLICATION)**

BEFORE: KEITH and JONES, Circuit Judges; and PECK, Senior Circuit Judge.[1]

PER CURIAM. This case concerns petitions for writs of error coram nobis based on ineffective assistance of counsel and due process of law following Defendants' convictions for union fund embezzlement, RICO charges, and filing false reports with the Secretary of Labor. Finding that Defendant-Appellant Harold Friedman's counsel employed competent trial strategies, and that there existed no state action to support Defendant-Appellant Anthony Hughes' due process claim, the district court denied the petitions without an evidentiary hearing. We concur in the district court's findings and affirm the judgment below.

[1]Hon. John W. Peck, senior circuit judge, deceased September 7, 1993. Judge Peck participated in the oral argument but not the decision in this case.

I.

Friedman and Hughes were officers of a local chapter of the International Brothers of Teamsters. On May 16, 1986, the grand jury returned an indictment charging Friedman with the following: 1) violating the RICO statute, 18 U.S.C. §1962(c) (1988)(Count 1); 2) RICO conspiracy, 18 U.S.C. §1962(d) (1988 & Supp. 1993)(Count 2); 3) embezzlement of labor union funds, 29 U.S.C. §501(c)(1988) (Counts 3 and 4); and 4) filing false reports with the Secretary of Labor, 29 U.S.C. §439(b)(1988)(Counts 5 and 6). Hughes was also charged in Counts 1, 2 and 4. In general, the indictment alleged that for a decade Appellants conspired to and engaged in a criminal enterprise by embezzling funds through the payment of salaries to "ghost employees" who did no work.

The record shows that the jury acquitted Friedman on 23 of the 26 racketeering acts alleged in each of the RICO counts. Neverthe-less, the jury convicted Friedman on Counts 1, 2, 4 and 6, and Hughes on Counts 1, 2 and 4. Both Defendants were sentenced to serve four (4) years on probation, pay fines, and forfeit their union positions and certain funds they accrued. The Defendants pursued direct appeals, but this court affirmed their convictions.

On May 9, 1990, Friedman filed a motion for a new trial based on newly discovered evidence. The district court denied the motion on January 3, 1991, and this court affirmed that decision on September 24, 1991.

Having exhausted all other avenues of attacking his conviction, Friedman filed a petition for writ of error coram nobis on April 20, 1992. The petition claimed that his trial attorney deprived him of his Fifth and Sixth Amendment rights as a result of ineffective assistance of counsel. Also, Hughes filed a petition for writ of error coram nobis on May 20, 1992, asserting that conduct engaged in by Co-Defendant Friedman's trial attorney violated Hughes' Fifth Amendment due process rights.

To support his petition, Friedman contends that Paul J. Cambria, Petitioner's chief trial counsel, failed to mount an "authorization defense," that is, failed to claim that the govern-ment authorized the conduct in the indictment. Friedman alleges that the FBI recruited his Co-Defendants Hughes and Presser (now deceased) as informants. He maintains Hughes and Presser provided information to be used to rid the union of organized crime influences. Friedman contends that the government authorized and

directed Presser and Hughes to hire the "ghost employees" in order to curb possible gang violence against them.

Cambria did make a motion to dismiss the indictment based on the authorization defense, which the district court denied prior to trial. However, the court granted his motion to admit the affidavits of the FBI agents who allegedly authorized the conduct into evidence pursuant to Federal Rules of Evidence 804(b)(5). Then Cambria introduced the defense to the jury during his opening statement. Despite these efforts, Cambria did not continue the authorization defense during trial.

The district court made the following findings: 1) that the failure of Friedman's trial counsel to mount the authorization defense did not deprive him of due process or effective assistance of counsel under the Fifth and Sixth Amendments; and 2) that the government did nothing to interfere with Hughes' ability to present the authorization defense and that he voluntarily elected not to present that defense at the time of trial. Based on these findings, the district court denied both petitions of error coram nobis without an evidentiary hearing on August 28, 1992. The appeal followed.

II.

At any time following the entry of judgment against a defendant, the writ of error coram nobis is available to a convicted criminal. Flippins v. United States, 747 F.2d 1089, 1091 (6th Cir.), cert. denied 481 U.S. 1056 (1987). We have a limited scope of review of a challenged judgment on a petition for writ of error coram nobis. United States v. Norman, 391 F.2d 212, 213 (6th Cir.), cert. denied, 390 U.S. 1014 (1968). "Under coram nobis the court reviews errors of fact committed in the original proceeding which are 'of the most fundamental character, that is, such as rendered the proceeding itself invalid.'" Flippins, 747 F.2d at 1091 (quoting United States v. Mayer, 235 U.S. 55, 69 [1914]). At a minimum, relief will not be granted unless it is probable that a different result would have occurred if the error of fact had been known to the trial court. Id.

With the standard of review in mind, we turn to examine the claims in this case of ineffective assistance of counsel and denial of due process of law. Finally, we address the district court's denial of Hughes' discovery requests.

III.

The constitutionally guaranteed "right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). For a defendant to prevail on an ineffective assistance of counsel claim, he must show 1) that counsel's performance was so deficient that counsel's errors deprived the defendant of the "counsel" guaranteed by the Sixth Amendment, and 2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The standard for measuring the attorney's performance is reasonable conduct under prevailing professional norms. Id. at 688. A court should not look back at a case with twenty-twenty hindsight and determine that counsel could have pursued a different defense. United States v. Lauga, 762 F.2d 1288, 1291 (5th Cir.), cert. denied, 474 U.S. 860 (1985). "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 [1955]). Strategic and tactical decisions, even if clearly wrong in retrospect, cannot support a claim for ineffective assistance of counsel. United States v. Yancey, 827 F.2d 83, 90 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988).

Trial counsel's tactics are not wholly immune from Sixth Amendment review, but the tactical decisions must be particularly egregious before they will provide a basis for relief. Martin v. Rose, 744 F.2d 1245, 1249 (6th Cir. 1984). In Martin, the defense counsel literally stood mute at trial; he did not cross-examine any witnesses, interpose any objections, call any witnesses, object to any portion of the jury instructions, or deliver a closing argument. The attorney limited his opening statement to informing the jury that he would stand mute. Under those facts, this court found that the adversarial process had collapsed and the "tactic" of standing mute constituted ineffective assistance of counsel. Id. at 1250. "this was constitutional error even without any showing of prejudice." Id. at 1251.

In contrast with Martin, we cannot find that attorney

Cambria's tactical decision to abandon the authorization defense was anything but an exercise of reasonable professional judgment. In this circuit, a criminal defendant is denied effective assistance of counsel where defense strategies and tactics are employed which lawyers of ordinary training and skill in criminal law would not consider competent, if another tactic wold have defended the client better and this tactic was foreseeable at the time of trial. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

The evaluation of defense counsel's performance must consider all the circumstances, viewed as of the time of counsel's conduce. Strickland, 466 U.S. at 690. When we review all the circumstances surrounding this case, it must be noted that the FBI agents, who allegedly authorized the hiring of the employees, elected to assert their Fifth Amendment right not to testify on the matter, as did Co-Defendant Hughes. Thus, the authorization defense could only be presented through affidavits, rather than through live witnesses. More importantly, the affidavits did not clearly establish that the FBI did authorize ghost employees.

The only evidence purporting to explain counsel's conduct at trial is Petitioner's Exhibit W, a letter from Cambria to Defendant Friedman dated April 24, 1991. Although the explanation for not pursuing the authorization defense came after the fact, the letter gave two (2) reasons. First, Cambria points out the risk of conflicting defenses. The main defense argued that the alleged ghost employees actually worked (or that Friedman relied on Presser's representation that they did so), while the authoriza-tion defense would have argued that the employees were authorized by the FBI to receive salaries and not work. Second, the trial record shows that an FBI special agent testified on voir dire that Presser did not become an informant until late 1976 or early 1977, well after one of the alleged ghost employees, John Nardi, was hired. In light of this, Cambria believed mounting an authoriza-tion defense would only weaken the main defense by highlighting what appeared to be the government's strongest piece of evidence: Nardi's uncontradicted testimony that he did absolutely no work for the salary he received.

In assessing counsel's overall performance, we accord substantial weight to the benefits attorney Cambria achieved for Friedman. Six (6) counts of the indictment named Friedman. Two (2)) of those counts, both under the RICO statute, contained 26 predicate acts each. The jury acquitted Friedman on two (2)

substantive counts and on 23 of the 26 predicate acts in each RICO count. In addition, counsel Cambria's effectiveness as a sentencing advocate is supported by the punishment Friedman received: probationary sentence with no imprisonment.

Therefore, taking into account all circumstances at the time of trial, Cambria's strategy to not present the authorization defense was not only reasonable and logical, but was also, to a large degree, successful.

Friedman's second basis for writ of error coram nobis is that attorney Cambria mentioned the authorization defense during his opening statement, but never supported the defense at trial. It can be competent trial strategy to broach a defense during opening statement and later abandon it based on trial developments. See: Howard v. Davis, 815 F.2d 1429, 1433 (11th Cir.), cert. denied, 469 U.S> 931 (1984); United States v. Bailey, 734 F.2d 296, 305-06 (7th Cir.), cert. denied, 469 U.S. 931 (1984). Further, to succeed on an ineffective assistance claim, the defendant must show that counsel's deficient performance prejudiced him such that he did not receive a fair trial. Strickland, 466 U.S. at 687. "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Id. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 350 [1980]). Petitioner Friedman has introduced no evidence showing that Cambria's failure to present the defense prejudiced him. Moreover, nothing in the record remotely suggests that Cambria represented conflicting interests. The trial lasted two (2) entire months; therefore, it is extremely unlikely that the jury distinctly remembered all the defenses mentioned in the opening statements.

Accordingly, we affirm the district court's denial of Friedman's writ of error coram nobis.

IV.

Hughes claims attorney Cambria violated his Fifth Amendment right to due process by not presenting the authorization defense and by threatening him with mob violence if he testified. The Due Process Clause does not extend to impose an affirmative obligation on the State to protect individuals from actions of private citizens. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (2989). Petitioner Hughes' allegations center around attorney Cambria's conduct and do not implicate the State.

The conduct of privately retained counsel does not constitute state action, a necessary component of any due process claim. See: Polk County v. Dodson, 454 U.S. 312, 317-19 (1981). In Polk, the Supreme Court held "that a lawyer [public defender] representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of §1983." Id. at 318. If a public defender whose salary is paid from state funds is not a state actor, a fortiori a private counsel is not one.

Finding that there existed no state action upon which to rest a due process claim, we affirm the district court' denial of Hughes' writ of error coram nobis.

V.

Hughes requested discovery of a significant amount of informa-tion relating to his former attorneys, the Climacos. The district court denied this request and issued protective orders barring such discovery. In a coram nobis action, the district court has discretion to apply the appropriate rules for discovery based on the facts of each case. See: United States v. Balistrieri, 606 F.2d 216, 221 (7th Cir. 1979), cert. denied, 446 U.S. 917 (1980). "The district court should consider the amount of time which has elapsed since the trial, the burden of discovery on the government and witnesses, and the nature of the applicant's claims in deciding on the scope of discovery at each stage of the coram nobis proceedings." Id. at 221-22. In denying Hughes' discovery request, the district court found that the requested documents were irrelevant and that production of the documents would be overly burdensome. We believe the district court did not abuse its discretion in so finding.

First, approximately three (3) years had passed between the sentencing and the discovery request. Prior to Hughes' Reply to Government's Response in Opposition to Motion for Production of Documents there were never any suspicions raised about the climacos being government informants.

Second, granting discovery would impose legal and practical burdens on the government. In this case, Hughes sought information located beyond the files of the prosecution; fir instance, Hughes wanted to obtain information from the FBI on whether the Climacos had ever been informants. Furthermore, the documents requested numbered in the thousands.

Third, the nature of Hughes's coram nobis petition had

absolutely nothing to do with the Climacos. The petition specifically alleged that attorney Cambria's conduct at trial violated his due process rights. Inquiry about the Climacos, who ceased representing Hughes several months before trial, was not even remotely related to attorney Cambria's trial conduct. This point alone justifies the district court's denying the discovery request.

The decision of the district court is affirmed.

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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. : CR 86-114
	)	
Plaintiff,	)	
	)	HON. GEORGE W. WHITE
v.	)	
	)	
HAROLD FRIEDMAN et al.,	)	**MEMORANDUM AND ORDER**
	)	
Defendents.	)	

Harold Friedman and Anthony Hughes have each filed Petitions for Writ of Error Coram Nobis, pursuant to 28 U.S.C. §1651, in the above-captioned matter. Both petitions are hereby denied.

On May 16, 1986, an indictment was returned by the federal grand jury for the Northern District of Ohio, Eastern Division, in a case originally styled, United States v. Presser, et al., Case No. CR 86-114, naming Jackie Presser (Counts I, II, III, V and VII), Harold Friedman (Counts I through VI) and Anthony Hughes (Counts I, II and IV) as Defendants. Defendant Presser died prior to trial.

The indictment, in essence, alleged that from January, 1972 through December 31, 1981, Presser, Friedman and Hughes engaged in a criminal enterprise, and conspired to do so, as officers and employees of Local 507 of the International Brotherhood of Teamsters and Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, by embezzling funds from Local 507 and Local 19 through the payment of salaries to "ghost employees," or employees who did not perform work for the union, in violation of 18 U.S.C. §§1962(c) and (d) - RICO (Counts I and II), and 18 U.S.C. §§2 and 501(c) - embezzlement of union funds (Counts III and IV); and, that Harold Friedman and Jackie Presser caused false reports to be filed with the Department of Labor regarding the salaries paid by Local 507 and Local 19 to "ghost employees," in violation of 18 U.S.C. §2 and 29 U.S.C. §439(b) and (d) (Counts V and VI). Presser was the only Defendant named in Count VII.

The "pattern of racketeering activity" alleged in the RICO charge and incorporated as substantive offenses in the indictment concerned the payment of salaries to "ghost employees", in particular, the salary paid by Local 507 to Jack Nardi, Jr. from 1972 through 1978; to Allen Friedman from 1972 through September of 1981; to George Argie from August of 1978 through June of 1979; and by Local 19 to Anthony Hughes from 1977 through 1981.

After jury trial, which began on October 15, 1988 and ended on January 10, 1989, Defendant Friedman was found guilty on four (4) out of the six (6) counts with which he was charged (Counts I, II, IV and VI), including the two (2) counts under the RICO statute. Defendant Hughes also was found guilty on the two (2) counts under the RICO statute (Counts I and II). In May of 1989, the Court pronounced judgment and sentence. Both Defendants were placed on probation for four (4) years and ordered to forfeit union positions as stipulated and certain funds and credits accrued by them. In addition, the Court imposed a fine of $35,000.00 on Defendant Friedman. The convictions were affirmed by the Sixth Circuit on July 26, 1990. The Court will now individually address each Petition for Writ of Error Coram Nobis.

I.

Petitioner Friedman asks this Court to vacate the judgment and sentence entered against him on the grounds that the failure of Petitioner's chief trail counsel, Paul J. Cambria, Jr., to mount a

critical and viable defense of which he had full knowledge, prejudicially deprived Petitioner Friedman of his constitutional rights to the effective assistance of counsel and due process of law as guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

In brief, Petitioner Friedman argues that both of his co-defendants, first Hughes and later Presser, were recruited as informants for the FBI to provide information which would be used to rid the Union of organized crime influences. Petitioner contends that the Government specifically authorized and directed Presser and Hughes to lure the "ghost employees," the very conduct charged in the indictment, in order to curb possible gangland violence against them. Cambria's failure to mount this "authorization defense" is the alleged misconduct underlying Friedman's petition to this Court.

Petitioner Friedman argues that before Presser died, Presser and his counsel were prepared to present evidence, through Presser's own testimony, establishing the authorization defense. According to the petition, following Presser's death, Paul Cambria, Defendant Friedman's counsel, who was privy to the defense strategy planned by Presser's counsel, expressed his similar intention to present the authorization defense. In that vein, Cambria made a motion to dismiss the indictment based on the defense, which the Court denied prior to trial. The Court granted, however, his motion to admit the affidavits of the FBI agents who allegedly authorized the conduct, into evidence under Federal Rule of Evidence 804(b)(5). Cambria then introduced the authorization defense to the jury during opening statement. Despite these efforts, however, Mr. Cambria did not mount the authorization defense during the trial.

Petitioner Friedman seeks to establish in the Writ of Error Coram Nobis that: (1) the authorization defense was appropriate and necessary to establish Petitioner's innocence; (2) Attorney Cambria had enough information at the time of trial to present the defense; and, (3) Petitioner was deprived of this substantial defense by the ineffectiveness of his counsel. In support of his contentions, Friedman states that he learned in July of 1991 that Attorney Cambria had misrepresented facts concerning documents related to the authorization defense; that Cambria concealed from him the value of the authorization defense; and that he abandoned the authorization defense against Petitioner's best interests.

More specifically, Petitioner Friedman claims that contrary to Cambria's representation that the decision to abandon the authorization defense was a collective decision among the defense attorneys, Cambria in fact demanded and maintained complete control of Friedman's defense. Friedman also avers that he did not knowledgeably approve waiving the authorization defense because Cambria had documentary evidence supporting the authorization defense, prior to trial, that he never reviewed with Friedman. In short, Petitioner claims he was misinformed by trial counsel as to the availability and viability of the authorization defense.

This Court finds that the failure of Petitioner Friedman's trial counsel to mount the authorization defense did not deprive Petitioner of due process or effective assistance of counsel under the Fifth and Sixth Amendments. Rather, counsel Cambria's decision not to pursue the authorization defense was a strategic, or tactical, trial decision made after careful deliberation. Instead of presenting the authorization defense, trial counsel chose to argue as his main defense that alleged ghost employees Allen Friedman, George Argie and Anthony Hughes had indeed performed Union work, and that Defendant Friedman had relied upon Presser's representations that alleged ghost employee John Nardi also performed work for the Union.

In order for a defendant to prevail on an ineffective assistance claim, defendant must show that counsel's allegedly deficient performance fell below an objective standard of reasonableness, and that prejudice resulted which deprived defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984). However, judicial review of a defense attorney's performance:

> . . . must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id., at 689. Thus, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . ." Id. A strategic decision, even if clearly wrong in retrospect, cannot support a claim that counsel's conduct

was deficient. United States v. Yancey, 827 F.2d 83, 90 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988).

If defense counsel's performance is evaluated considering all the circumstances, as required under Strickland, 466 U.S. at 688-690, then this Court must first recognize the substantial benefits defense counsel achieved for Defendant Friedman. Friedman was named in six (6) counts of the indictment. Two (2) of those counts were under the RICO statute and each contained 26 predicate acts. The jury acquitted Defendant Friedman on two (2) substantive counts and on 23 of the 26 predicate acts in each RICO count. In addition, counsel Cambria was a highly effective sentencing advocate. Friedman obtained a probationary sentence with no imprisonment. Further, his sentence and mandatory debarment were stayed for 19 months pending appeal.

A court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. Strickland, 466 U.S. at 690. Petitioner's Exhibit W, a letter from Paul Cambria to Harold Friedman dated April 24, 1991, explains that Cambria decided not to present the authorization defense for two (2) reasons. First, Cambria points out that the inconsistency between arguing the main defense - that the alleged ghost employees actually worked (or that Friedman relied upon Presser's representations that the did so) - and arguing that they were authorized to receive salaries but not work, would actually weaken the main defense. Secondly, the trial record shows that FBI Special Agent Jerome Campane testified on voir dire that according to the Presser informant file, Jackie Presser did not become an informant until late 1976 or early 1977, well after alleged ghost employee John Nardi was hired. As reflected in Exhibit W, Cambria believed that unless the authorization defense could cove all four (4) employees, mounting an incomplete authorization defense would weaken the main defense, and would highlight what appeared to be the strongest part of the government's case - John Nardi's uncontradicted testimony that he did absolutely no work.

Although the reasons Cambria describes in the April 1991 letter for not pursuing the authorization defense are after-the-fact, this Court cannot find that Attorney Cambria's tactical decision was anything abut an exercise of reasonable professional judgment. It also should be noted that because the FBI agents elected to assert their Fifth Amendment rights, and because Co-Defendant Hughes

elected not to testify, the authorization defense could be presented only through affidavits, rather than live witnesses. Moreover, the affidavits did not clearly establish that the FBI specifically authorized George Argie and Anthony Hughes to receive salaries but not work. Therefore, in light of all the circumstances existing at the time of trial, the decision not to present the authorization defense satisfies an objective standard of reasonableness.

Petitioner Friedman's second basis for error coram nobis, Cambria's failure to pursue the authorization defense after mentioning it in opening statement, is similarly overruled. In an ineffective assistance claim the defendant must establish that counsel's deficient performance prejudiced the defense and deprived defendant of a fair trial. Strickland, 466 U.S. at 687. Defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding wold have been different. Id. at 694. This Court finds that Cambria's decision to alter the defense in response to trial events was competent trial strategy. Furthermore, Petitioner has not established that he suffered any prejudice as a result of the change in tactic. Petitioner's bare conclusion that, absent counsel's error there is a reasonable probability that the result would have been different, is wholly speculative.

Accordingly, the Petition for Writ of Error Coram Nobis filed by Harold Friedman is hereby denied.

II.

Anthony Hughes filed a Petition for Writ of Error Coram Nobis that joined in the petition filed by Harold Friedman. Petitioner Hughes also requests that this Court vacate the judgment and sentence entered on the grounds that Petitioner's conviction was unjust and unlawfully produced in violation of his fundamental right to due process of law as guaranteed by the Fifth Amendment of the United States Constitution. Petitioner Hughes does not claim that he was deprived of the effective assistance of counsel under the Sixth Amendment.

Hughes' petition also is based on the failure of Paul Cambria, trial counsel for Harold Friedman, to present the authorization defense. Prior to Jackie Presser's death, Presser and Hughes were represented by John and Michael Climaco. When Presser died, the Climacos withdrew as counsel and Petition obtained new trial counsel. However, he had to substantially rely on

Mr. Cambria because Cambria was present during pretrial discovery and motions, and had access to documents which were not made available to Petitioner's new counsel. In addition, Hughes states that he did not want to come forward and personally present the authorization defense because he feared violent reprisal against him and members of his family if he acknowledged his informant status. He reasoned, however, that Mr. Cambria could present the authorization defense without jeopardizing the safety of his client, Harold Friedman, who was never a confidential informant for the FBI. Hughes therefore directed his new counsel to follow Mr. Cambria's lead.

According to Hughes' petition, Cambria explained that his decision not to present the authorization defense at trial was because the people in Buffalo told him that Hughes would be murdered if he testified to being an informant, and that it would not "sit well" for Cambria if he presented the defense to help an informant. Petitioner Hughes contends that despite the risk, he would have testified if Cambria had requested that he do so. Instead, he told his own trial counsel to concentrate on presenting evidence that he did perform work for the union.

As the Government points out in its opening brief, Petitioner's contentions are not supported by the record. For instance, Hughes' informant status was publicly confirmed before and during the trial. In a hearing on March 9, 1987, counsel for both sides freely and publicly discussed Presser's and Hughes' relationship with the FBI and its impact on the authorization defense. On that date, government counsel also noted that, in a criminal case filed in another judicial district against FBI Special Agent Friedrick, the government had been forced to conform that Presser and Hughes had been FBI informants. During the trial itself, but before Hughes was required to decide whether to testify, FBI Special Agent Jerome Campane confirmed, during a voir dire examination, that Presser and Hughes had been informants.

Furthermore, Hughes testified on January 4, 1990 about his informant relationship with the FBI in civil proceedings before Teamsters Independent Administrator Frederick Lacey. Significantly, Hughes explained to Administrator Lacey that he did not testify at trial in Cleveland because he believed that the government had a weak case, not because he feared for his life.

The Court also finds significant the fact that Petitioner Hughes could have presented the authorization defense after his

Co-Defendant's counsel failed to do so. Counsel for Defendant Friedman, Paul Cambria, rested his case first. When Friedman rested without raising the authorization defense, Hughes still had an opportunity to do so. Nonetheless, he elected not to raise the defense.

Petitioner Hughes has argued that his due process rights were violated when he was charged and convicted for conduct which was specifically directed and authorized by the government, and that the prejudice incurred by Harold Friedman from Mr. Cambria's conduct infected his own right to a fair trial when the trial was joint and Cambria was lead counsel. However, there must be governmental action before the Due Process Clause can be violated. See e.g., DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). Petitioner contends that the government's continued denial of the legitimacy of the authori-zation defense was outrageous misconduct. Yes, in view of the totality of the circumstances, this Court finds that the government did nothing to interfere with Petitioner's ability to present that authorization defense and that he voluntarily elected not to present that defense at time of trial. In addition, any threats that Mr. Cambria, a privately retained attorney, may have made regarding violent mob retaliation if Hughes testified cannot be attributed to the government.

Accordingly, Anthony Hughes' Petition for Writ of Error Coram Nobis is hereby denied.

IT IS SO ORDERED.

George W. White
UNITED STATES DISTRICT JUDGE

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§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, ch 646, § 1, 62 Stat. 944; May 24, 1949, ch 139, § 90 63 Stat. 102.)